No. 12,430

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM PATRICK BRANDHOVE,
Appellant,

vs.

JACK B. TENNEY; THE SENATE FACT-FINDING COMMITTEE ON UN-AMERICAN ACTIVITIES, (a California Legislative Committee); HUGH M. BURNS; NELSON S. DILWORTH; FRED H. KRAFT; LOUIS G. SUTTON, CLYDE A. WATSON and ELMER E. ROBINSON,
Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE ELMER E. ROBINSON.

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STATEMENT OF CASE.

Appellant filed this action against the members of the Un-American Activities Committee of the California State Senate and Elmer E. Robinson, as a private citizen, claiming damages for an interference with his freedom of speech or his right to petition the

California Legislature. Appellant bases the jurisdiction of this Court on Sections 43 and 47 of Title 8 U.S.C., which he quotes in his opening brief.

The complaint, with its exhibits, stripped of arguments and conclusions, alleges:

That on January 28, 1949, appellant was circulating an unsworn petition among the California State Legislators which accused the Tenney Un-American Activities Committee of using him as an instrument to smear Franck R. Havenner as a candidate for mayor in 1946, implicating Elmer E. Robinson, Mayor of San Francisco, and asserting that no further appropriations should be made to the Committee for their work. (Tr. pp. 4 and 5.) From the exhibits attached to the complaint, it appears that this petition stated facts contrary to a sworn affidavit made in San Francisco previously by appellant (Tr. pp. 23 and 24, Exh. D, and Tr. pp. 42 and 43), and contrary to his sworn testimony given in Oakland before the Tenney Committee on a previous occasion. (Tr. p. 25, Exh. E.) The complaint further alleges: that Tenney telegraphed the District Attorneys of San Francisco and Alameda, requesting perjury action against appellant because of the statements' variance with his sworn testimony (Tr. p. 6); that appellee Tenney advised Elmer E. Robinson by telephone of the charges in the petition; that it was agreed to hold a Committee meeting and that Elmer E. Robinson would appear as a witness (Tr. p. 5); that a subpoena was served on appellant to appear before the Tenney Committee on January 29, 1949 (Tr. p. 5), (the Legislature had

recessed on January 29, 1949 at 3:00 o'clock P.M.); that appellant and his counsel appeared, as did Elmer E. Robinson; that Elmer E. Robinson made a statement and then testified under oath concerning the matters charged in appellant's petition (Tr. p. 7); that appellant was sworn, but refused to testify, and was charged with a misdemeanor under Section 9412 of the California Government Code for refusing to testify (Tr. p. 8); that he was tried and, after a disagreement (11 to 1 for acquittal) the complaint was dismissed. (Tr. p. 9.)

Aside from the foregoing, the complaint is replete with accusations, conclusions and arguments, which should be disregarded.

The lower Court's action in dismissing the complaint as to appellee Elmer E. Robinson was correct for three reasons:

1. The complaint fails to allege any facts showing that appellee Elmer E. Robinson committed any wrongful act.

2. The Federal Court had no jurisdiction of the action.

3. In any event, appellee Elmer E. Robinson, as a private citizen not acting under color of State authority, is not subject to suit under the statutes cited.

I.

THE FACTS ALLEGE NO ACTIONABLE WRONG BY APPELLEE ELMER E. ROBINSON.

Aside from the legal obstacles to appellant's position, it is elementary that the complaint must allege the commission of some wrongful act or acts by appellee, Elmer E. Robinson, and damage to the appellant.

Appellant's theory seems to be that Elmer E. Robinson conspired with appellee Tenney to appellant's damage, because he received a telephone call from appellee Tenney advising him of the charges in appellant's petition and he and Tenney discussed the matter and it was agreed to have a Committee hearing of the Tenney Committee, where appellee Elmer E. Robinson would appear. It is not alleged nor contended that appellee Elmer E. Robinson could call a meeting of the Committee. Hence, the net result of the appellant's allegations in this regard is that Elmer E. Robinson agreed to appear before the Committee to testify as to the charges made against himself and the Committee. In sum, this is all that is charged against appellee, Elmer E. Robinson, other than the fact that he appeared, made an unsworn statement and testified.

Appellant's objection is that because appellee Elmer E. Robinson exercised his right of free speech, appellant was injured by Robinson's denial, under oath, of appellant's unsworn charges, which appear to be contrary to appellant's previous sworn testimony. Such a position is inconsistent, to say the least, but

is no more inconsistent than the many other well-known attacks on the Un-American Activities Committee of the various States and Congress.

Who is the appellant Brandhove? We are, of course, limited to the record on appeal. However, a careful examination of this record discloses that the appellant, who is careless with the facts, now demands damages because somehow, not clearly shown, his right to petition the California Legislature was impaired. (From the record attached to his complaint, it is clear that appellant appeared before the Tenney Committee on November 4, 1947, and there testified on a number of matters (Tr. p. 43), and at that hearing Mr. Gladstein presented an affidavit of Brandhove to the effect that previous testimony given by him was false and Brandhove testified he had been offered $5,000.00 to make the affidavit. (Tr. p. 43 and Tr. pp. 68 and 69.)

From a purely factual standpoint, appellee, Elmer E. Robinson contends that appellant has failed to allege facts showing any interference with (a) his right of free speech, or (b) his right to petition the California Legislature. Appellant has failed to sustain the burden of showing how anything done by Elmer E. Robinson was wrongful or damaging to him, and hence, it is submitted that the complaint was properly dismissed as to appellee Elmer E. Robinson on the ground that no facts are alleged that competently charge him with a wrongful act. In a civil action for damages under Sections 43 and 47 of Title 8 U.S.C., the action is based on the wrong or wrongs perpetrated by the defendant or defendants. There is no

cause of action for a civil conspiracy as such. This question was thoroughly discussed in *Moffett v. Commerce Trust Co.,* 75 F. Supp. 303. In this case, the plaintiff sued several persons for damages resulting from a conspiracy which deprived her of due process of law and equal protection of the law. She based her action on Sections 43 and 47 of Title 8 U.S.C. The action was dismissed and the Court said:

> "This being an action for a civil wrong wrought under an alleged conspiracy, it must not be forgotten that the gist or gravamen of the action is not the conspiracy itself but the civil wrong done under the conspiracy and which wrong or wrongs resulted in damage to plaintiff."

and,

> "It is the rule, therefore, that each tortious act resulting in damage creates an independent, separate and distinct cause of action against the conspirators."
>
> "An inspection of plaintiff's amended complaint shows that it contains many alleged tortious acts. These are not separated but are incorporated in one complaint as if there was a single cause of action, and, at the conclusion of the complaint covering 83 typewritten pages, plaintiff prays damages as above set out. The complaint partakes of the nature of a Federal indictment in the case of a criminal conspiracy and the alleged tortious acts are treated merely as overt acts. This, of course, cannot be done under the Federal Rules of Civil Procedure. 28 U.S.C.A. following Section 723 C."

See also Vol. 15, *Corpus Juris Secundum,* Conspiracy, Section 21.

From a careful reading of appellant's complaint in our case, we must conclude that he fails to allege a single wrongful act committed by appellee Elmer E. Robinson, and further fails to allege how any act of said appellee caused him or his property any damage.

In *U. S. v. Josephson,* 165 F. (2d) 82, the Court, in affirming the conviction of defendant for refusing to testify before the Congressional Un-American Activities Committee said:

> "Thus, the only real basis for the appellant's contention seems to be that in some way the First Amendment in protecting freedom of speech guarantees such privacy in speaking as the particular speaker may desire, and that this privacy is violated by whatever disclosure occurs incidental to an investigation for legislative purposes. This is a fallacy essentially based upon the idea that the Constitution protests timidity."

Paraphrasing the foregoing quotation, we may say that appellant contends that the 14th Amendment somehow protects him and his utterances from criticism and enjoins silence on those he selects for his criticism, and no one should be permitted to answer his accusations.

Therefore, it is submitted that on a purely factual basis, the complaint was properly dismissed for failing to allege the commission of any wrongful acts by appellee Elmer E. Robinson, or for that matter by any appellee.

II.

THE FEDERAL COURT HAD NO JURISDICTION OF THE ACTION.

In discussing the legal obstacles to appellant's action in the Federal Court, we must, like appellant, assume that his freedom of speech and right to petition the California Legislature was interfered with or obstructed.

Appellant bases jurisdiction on Sections 43 and 47 of Title 8 U.S.C. These statutes were adopted as enabling acts to the 14th and 15th Amendments to the United States Constitution, and hence, the scope of their application is limited by the scope of the amendments.

> *United States v. Cruikshank,* 92 U.S. 542, 23 L. ed. 588.

In the first place, it seems clear that the right to petition the California Legislature is not a right protected by the 14th and 15th Amendments. In *Snowden v. Hughes,* 321 U.S. 1, 88 L. ed. 497, it was held that right to be a candidate to a State office is not protected by the 14th Amendment.

Other rights not protected by the 14th Amendment from State action are:

> Right to trial by jury in a State Court. *Tompsett v. Ohio,* 146 Fed. (2d) 95.
>
> Freedom from unreasonable searches and seizures. *United States v. Crosby,* 1 Hughes 448, Fed. case No. 14,893.
>
> Right to indictment by Grand Jury. *Maxwell v. Dow,* 176 U.S. 581.

Prohibition against self-incrimination. *Adamson v. California,* 332 U.S. 46.

Right to be charged by indictment in felony cases. *Hurtado v. California,* 110 U.S. 516.

In *Hardyman v. Collins,* 80 F. Supp. 501, we find an excellent discussion of the difference between rights protected by the 14th Amendment and those that are personal and come under solely State jurisdiction.

Thus, if any right protected by the 14th and 15th Amendments was violated, it was appellant's right to freedom of speech. This right is protected from State action by the "due process" clause of the 14th Amendment. *Douglas v. Jeannette,* 319 U.S. 157, 87 L. ed. 1324.

The law is clear that Section 43 of Title 8 U.S.C. applies to protection against violation of due process of law, and Section 47 of Title 8 U.S.C. (*conspiracy section*) applies only to denial of equal protection of the laws. In a case footnote to *McShane v. Moldovan,* 172 F. (2d) 1016, the Court said:

> "Sections 43 and 47 grant separate and distinct rights of action. Section 43 gives a cause of action for denial of due process of law; and Section 47, for denial of equal protection of the laws. See Mitchell v. Greenough, 9 Cir., 100 F. (2d) 184; Bottone v. Lindsay, 10 Cir., 170 F. (2d) 705."

In *Mitchell v. Greenough,* 100 F. (2d) 184, this distinction is discussed. The action under civil rights statutes for damages for conspiracy to deprive plaintiff of right to practice law through a conviction by use of perjured testimony. Section 47 was the basis

of plaintiff's complaint, and was held not applicable because it related to equal protection of the laws, which is not the same as due process of law.

> "The prohibition against denial of the equal protection of the law was to prevent class legislation or action."
>
> "The question then is whether or not a conspiracy to secure a conviction of a criminal offense in a Court having jurisdiction thereof and of the defendant knowingly using perjured testimony to convict an innocent person, is a conspiracy for the purpose of impeding the due course of justice in an attempt to deny to any citizen the equal protection of the laws. It is only in case of a conspiracy to effectuate such a purpose that one damaged in his person or property, or deprived of his rights as a citizen of the United States, is entitled to maintain an action for damages in the Federal Courts under the Statute."
>
> "No such purpose was involved in the alleged conspiracy in the case at bar. Appellant was subjected to no greater hazard of being prosecuted for a crime and convicted by false testimony * * *."

Thus, if appellant in our case has a cause of action, it must be based on Section 43 of Title 8 U.S.C., which states:

> "*Every person who, under color of any Statute, Ordinance, regulation, custom, or usage, of any State or Territory,* subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be

liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 47 does not apply, hence the allegations of conspiracy must be disregarded as surplusage and the acts of each individual appellee must be examined to determine if any one of them committed an act damaging appellant as defined in Section 43 Title 8 U.S.C.

It is submitted that everything that any appellee did was lawful and did not interfere with appellant's freedom of speech.

The Courts will not inquire into the propriety of the resolution creating the State Un-American Activities Committee and will accept the declaration in the creating resolution that the information is sought for legislative purpose. *United States v. Josephson,* 165 F. (2d) 82; *Barsky v. United States,* 167 F. (2d) 241. Hence, everything done by the Committee was lawful and proper and while it may have inconvenienced appellant to appear, so would it inconvenience any citizen to appear before the Committee to testify, or so it does inconvenience every witness called to testify in Court.

This phase of the case is more completely covered by the brief of the other appellees and this appellee ent concurs in their position. Obviously, if no cause of action is stated as to the members of the Committee, then none is stated as to appellee, Elmer E. Robinson.

Wherefore, it is submitted that the complaint was properly dismissed on the ground that it failed to state a cause of action of which the Federal Court had jurisdiction.

III.

SECTION 43, TITLE 8, U.S.C., DOES NOT APPLY TO APPELLEE ELMER E. ROBINSON, AS A PRIVATE CITIZEN NOT ACTING UNDER COLOR OF STATE AUTHORITY.

But as to appellee, Elmer E. Robinson, we must go one step further. By an unbroken line of cases, the Supreme Court has consistently held that, with the exception of purely Federal rights (right to vote in Congressional election, etc.), the power of Congress to pass enabling legislation under the 14th Amendment is limited to limitations upon State action and State officials or agents acting under color of State authority.

Civil Rights cases, 109 U.S. 3; 27 L. ed. 835;

Hodges v. United States, 203 U.S. 1; 51 L. ed. 65;

Butts v. Merchants Co., 230 U.S. 126; 57 L. ed. 1422;

Wheeler v. United States, 254 U.S. 281; 65 L. ed. 270;

Screwes v. United States, 325 U.S. 91; 89 L. ed. 1495;

Powe v. United States, 109 F. (2d) 147;

Love v. Chandler, 124 F. (2d) 785.

Thus, appellee, Elmer E. Robinson, as an individual, could not be civilly sued under a Congressional Act for violating any non-Federal civil rights protected by the 14th Amendment, such as freedom of speech. Appellant attempts to avoid this problem by asserting that a person not able to commit a crime himself can be liable for conspiracy with others to commit the crime. He cites several criminal cases. These cases merely hold that "A" may be criminally guilty of conspiring with "B" to commit a criminal act, even though "A" could not commit the act himself. For example, in the *Downs* case, 3 Fed. (2d) 855, it was held that officers of the law could be convicted of conspiring with two other persons to bribe themselves, even though they could not personally be convicted of the substantive crime of offering themselves a bribe. In the *Rabinowitch* case, 238 U.S. 78, six persons were indicted for conspiracy to violate the United States Bankruptcy Act relating to the concealing of property. Three of the persons owned the property; three did not. However, the Court properly held that all six could be convicted of conspiracy to conceal the property.

These cases cited by counsel are criminal cases, and obviously not applicable in the instant case, because in each of the cases cited, a conspiracy to commit a particular crime was a separately recognized offense within itself.

Here, appellant overlooks one thing. In the cases cited, there was jurisdiction and power to define a

crime. In our case, Congress is without Constitutional power to legislate civil liability upon private individuals under the 14th and 15th Amendments. It cannot do indirectly what it cannot do directly, and any construction of a Congressional Act beyond the constitutional power to legislate would be as unconstitutional as the bad legislation itself. Furthermore, civil liability under an alleged conspiracy is different than a criminal conspiracy. In the case of a crime, the conspiracy is punished. In the case of civil conspiracy, the gravamen of the action is the civil wrong done. There is no civil liability for a conspiracy as such. The liability is for the actual wrong committed. *Moffett v. Commerce Trust Co.* (supra).

Thus appellee, Elmer E. Robinson, if liable at all, would be liable for damages resulting from any of his own acts claimed to have interfered with appellant's free speech, and not for the conspiracy. For this reason, appellant cannot avoid the constitutional barrier to the present claim against appellee Elmer E. Robinson as an individual.

Section 43 of Title 8 of U.S.C., cited by appellant, cannot be the basis of an action against appellee, Elmer E. Robinson, because he was admittedly *not* acting under color of State authority. Appellant's only claim of jurisdiction over Elmer E. Robinson is that he is liable under Section 47 (3) Title 8 U.S.C. because he conspired with others who acted under color of State authority. However, it has been held that this section applies to equal protection of the

laws and not to rights arising under the due process provisions of the 14th Amendment. *McShane v. Moldovan,* 172 F. (2d) 1016; *Hardyman v. Collins,* 80 F. Supp. 501.

In our case, there is no allegation or showing that appellant was deprived of equal protection of the laws by Elmer E. Robinson or anyone else. This section cannot be the basis of a claim of damages for interference with freedom of speech. And even in the cases where it applies, it is limited to damages to person or property—none of which are alleged in appellant's complaint.

Section 43 is the only section that could apply, to give a cause of action for interference with freedom of speech. *Hague v. C.I.O.; McShane v. Moldovan,* 172 F. (2d) 1016.

Section 47 is limited to matters relating to equal protection of the laws.

Wherefore, it is submitted that the complaint was properly dismissed on the ground that the Federal Court had no jurisdiction in a civil suit for damages against appellee, Elmer E. Robinson, as an individual, not acting under color of authority.

CONCLUSION.

In summary, it is submitted that from a purely factual standpoint, the complaint fails to allege the commission of any wrongful acts by appellee Elmer E.

Robinson or any other appellee, and thus, aside from the legal obstacles to appellant's complaint, the lower Court acted properly in dismissing it as it stated no cause of action.

Dated, San Francisco, California,
April 14, 1950.

Respectfully submitted,
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